**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

MOHAMED ABDELAL,

Plaintiff,

vs.

COMMISSIONER, RAYMOND W. KELLY; CITY OF NEW YORK,

Defendants.

Civil Action No. 13-cv-04341 (ALC)(SN)

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARYJUDGMENT**

# TABLE OF CONTENTS

**PRELIMINARY STATEMENT** ........ 1

**STATEMENT OF FACTS** ........ 1

**ARGUMENT** ........ 2

I. **ISSUE PRECLUSION CANNOT APPLY TO PLAINTIFF'S CLAIMS** ........ 2

II. **PLAINTIFF HAS DEMONSTRATED A TRIABLE ISSUES OF MATERIAL FACT DISPUTE WITH RESPECT TO HIS DISPARATE TREATMENT CLAIMS UNDER SECTION 1981, TITLE VII, THE NYSHRL, AND THE NYCHRL** ........ 6

A. **Legal Standard on Summary Judgment** ........ 6

B. **Plaintiff has Established a Prima Facie Case of Disparate Treatment** ........ 8

i. *Plaintiff's Claims of Unjustified and Intrusive Surveillance and Excessive Discipline Are Materially Adverse* ........ 8

ii. *Plaintiff has Raised a Triable Inference of Discrimination* ........ 12

1. **Non-Termination Related Claims: Inference of Discrimination** ........ 13

2. **Termination Related Claim: Inference of Discrimination** ........ 18

C. **Plaintiff Has Demonstrated that Defendants' Proffered Legitimate, Non-Discriminatory Reasons for the all the Adverse Actions are Pretextual** ........ 22

III. **PLAINTIFF HAS ESTABLISHED A TIMELY PRIMA FACIE CASE OF RACE, NATIONAL ORIGIN, AND RELIGIOUS-BASED HOSTILE WORK ENVIRONMENT** ........ 28

**CONCLUSION** ........ 31

## TABLE OF AUTHORITIES

CASES PAGE(S)

*Abrams v. Dep't of Pub. Safety*,
764 F.3d 244, 251 (2d Cir. 2014)....22

*Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*,
No. 05–CV–5155, 2010 WL 985201, at *1 (E.D.N.Y. Mar. 15, 2010)....5

*Anderson v. Liberty Lobby*,
477 U.S. 242, 250 (1986)....6

*Azar v. TGI Friday's, Inc.*,
*945 F.Supp. 485, 499 (E.D.N.Y.1996)*....12

*Barounis v. N.Y.C. Police Dep't*,
No. 10 Civ. 2631, 2012 WL 6194190, at *9 (S.D.N.Y. Dec. 12, 2012)....28

*Beachum v. AWISCO N.Y.*,
785 F.Supp.2d 84, 94 (S.D.N.Y.2011)....13

*Brown v. City of Syracuse*,
673 F.3d 141, 151 (2d Cir. 2012)....9

*Chambers v. TRM Ctrs. Corp.*,
*43 F.3d 29, 37 (2d Cir.1994)*....12

*Chertkova v. Conn. Gen. Life Ins.*,
92 F.3d 81, 91 (2d Cir.1996)....12

*Chin v. Port Auth. of New York & New Jersey*,
685 F.3d 135, 150 (2d Cir.2012)....13

*Cruz v. Coach Stores, Inc.*,
202 F.3d 560, 570 (2d Cir. 2000)....30

*Curry v. City of Syracuse*,
316 F.3d 324, 330–31 (2d Cir. 2003)....4

*Danzer v. Norden Sys., Inc.*,
*151 F.3d 50, 55 (2d Cir.1998)*....12

*Del Pozo v. Bellevue Hosp. Ctr.*,
No. 09 Civ. 4729, 2011 WL 797464, at *6 (S.D.N.Y. Mar. 3, 2011)....3

*DeVito v. Valley Stream Cent. High Sch. Dist.*,
No. 09-CV-0287 JS ARL, 2011 WL 3471552, at *5 (E.D.N.Y. Aug. 3, 2011) ....8

*Dister v. Continental Group, Inc.*,
859 F.2d 1108, 1114 (2d Cir.1988) ....5

*Fincher v. Depository Trust & Clearing Corp.*,
604 F.3d 712, 724 (2d Cir.2010) ....28

*Fisher v. Vassar Coll.*,
66 F.3d 379, 391-92 (2d Cir. 1995) ....8

*Gallo v. Prudential Res. Services*,
22 F.3d 1219, 1223 (2d Cir.1994) ....7

*Graham v. Long Island Rail Road*,
230 F.3d 34, 40 (2d Cir.2000) .... passim

*Gutierrez v. City of New York*,
756 F. Supp. 2d 491, 501 (S.D.N.Y. 2010) ....29

*Hamilton v. Atlas Turner, Inc.*,
197 F.3d 58, 61 (2d Cir.1999) ....5

*Harris v. Forklift Sys., Inc.*,
510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) ....28

*Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent*,
198 F.3d 68, 72 (2d Cir.1999) ....22

*Holcomb v. Iona Coll.*,
521 F.3d 130, 142 (2d Cir.2008) ....3

*Honey v. County of Rockland*,
200 F.Supp.2d 311, 320-21 (S.D.N.Y.2002) ....8

*Hunt v. Cent. Consol. Sch. Dist.*,
951 F. Supp. 2d 1136, 1212-1213 (D.N.M. 2013) ....20

*Int'l Bhd. of Teamsters v. United States*,
431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ....13

*Joseph v. Leavitt*,
465 F.3d 87, 90 (2d Cir.2006) ....8, 9

*Kirkland v. Cablevision Sys.*,
760 F.3d 223, 224 (2d Cir. 2014) ....................6

*Leather v. Eyck*,
180 F.3d 420 (2d Cir.1999) ....................3

*Lytle v. JPMorgan Chase*,
No. 08 Civ. 9503, 2012 WL 393008, at *19 (S.D.N.Y. Feb. 8, 2012) *adopted by* 2012 WL 1079964 (S.D.N.Y. Mar. 30, 2012), *aff'd by* 518 Fed.Appx. 49 (2d Cir.2013) ....................7

*Malarkey v. Texaco, Inc.*,
983 F.2d 1204, 1210 (2d Cir.1993) ....................12

*Mandell v. Cnty. of Suffolk*,
316 F.3d 368, 379 (2d Cir. 2003) ....................20

*Maresco v. Evans Chemetics, Division of W.R. Grace & Co.*,
964 F.2d 106, 114 (2d Cir. 1992) ....................23

*Marfia v. T.C. Ziraat Bankasi*,
903 F.Supp. 463, 468 (S.D.N.Y.1995) ....................12

*Marvel Characters, Inc. v. Simon*,
310 F.3d 280, 286 (2d Cir. 2002) ....................7

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
475 U.S. 574, 587 (1986) ....................7

*McDonnell Douglas Corp. v. Green*,
411 U.S. 792, 802 (1973) ....................7, 8

*McGullam v. Cedar Graphics, Inc.*,
609 F.3d 70, 76 (2d Cir.2010) ....................29

*McPherson v. N.Y.C. Dep't of Educ.*,
457 F.3d 211, 216 (2d Cir. 2006) ....................3

*Melman v. Montefiore Med. Ctr.*,
98 A.D.3d 107, 113, 946 N.Y.S.2d 27 (N.Y.App.Div.2012) ....................7

*Mental Disability Law Clinic, Touro Law Ctr. v. Carpinello*,
189 Fed.Appx. 5, 7 (2d Cir. 2006) ....................6
*Mullins v. City of New York*,
626 F.3d 47 (2d Cir.2010) ....................9, 10

*Owens v. New York City Housing Authority*,
934 F.2d 405, 410 (2d Cir.1991) ....................12

*Perry v. Ethan Allen, Inc.*,
115 F.3d 143, 149 (2d Cir.1997) ....................30

*Perry v. Int'l Transp. Workers' Fed'n*,
750 F. Supp. 1189, 1194 (S.D.N.Y. 1990) ....................7

*Rivera v. Baccarat, Inc.*,
No. 95 CIV. 9478 MBM JCF, 1997 WL 400119, at *5 (S.D.N.Y. July 15, 1997) ....................23

*Raza v. City of New York*,
998 F. Supp. 2d 70 (E.D.N.Y. 2013) ....................18

*Satchell v. Dilworth*,
745 F.2d 781, 784 (2d Cir.1984) ....................5

*Saks v. Franklin Covey Co.*,
316 F.3d 337, 350 (2d Cir. 2003) ....................5

*Texas Dept. of Community Affairs v. Burdine*,
450 U.S. 248, 254 – 255 (1981) ....................8

*United States v. City of New York*,
717 F.3d 72, 83 (2d Cir. 2013) ....................13

*Vargas v. City of New York*,
377 F.3d 200, 205–06 (2d Cir. 2004) ....................2

*Villar v. City of New York*,
135 F. Supp. 3d 105, 126 (S.D.N.Y. 2015) .................... passim

*Weston v. Cornell University*,
116 A.D.3d 1128, 1130 (2014) ....................4

*Williams v. N.Y.C. Hous. Auth.*,
61 A.D.3d 62, 872 N.Y.S.2d 27, 39 (1st Dep't 2009) ....................28, 29

*Williams v. Regus Mgmt. Grp.*, LLC,
836 F.Supp.2d 159, 173 (S.D.N.Y.2011) ....................7

**STATUTES**

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq* ....................6, 22, 29

New York State Human Rights Law, N.Y. Executive Law § 290 *et seq* .......................................6

New York City Human Rights Law, N.Y. Admin Code 8-101, *et seq.* ..........................................6

42 U.S.C. §1981 ...............................................................................................................................6

**OTHER AUTHORITIES**

Federal Rule of Civil Procedure 8(c) .........................................................................................4, 5

Federal Rule of Civil Procedure 56 ...............................................................................................6

NYPD Patrol Guide ("P.G.") ........................................................................................... passim

## PRELIMINARY STATEMENT

Defendants' Motion for Summary Judgment mimics the flaws of the decision making process, policies and culture in the NYPD which gave rise to Plaintiff's discriminatory termination – it ignores compelling evidence of widespread bias, fails to address the circumstances which contributed to a culture of bias, and fails to acknowledge and follow applicable precedent. [redacted] Instead, Defendants repeatedly point to the perceived merit of their decisions without addressing the bias of the decision makers, decision making process, and those who influenced the process. The question of whether or not the incidents, largely undisputed, which gave rise to Plaintiff's termination are objectively termination-worthy – [redacted] – is not relevant to the ultimate question of whether or not Plaintiff's race, national origin, or religion was a motivating factor in the NYPD's investigatory efforts and termination decision, and whether, subjectively and for the purposes of non-injunctive monetary damages only, the termination would otherwise have occurred but for the discrimination. Compelling and uncontested evidence supports the conclusion that the [redacted] investigation and Plaintiff's ultimate termination were the product of unlawful bias.

## STATEMENT OF FACTS

Plaintiff respectfully refers this Court to Plaintiff's accompanying Opposition to

Defendant's Rule 56.1 Statement and Plaintiff's Statement of Additional and Disputed Facts as to which Plaintiff contends there exists a genuine issue of fact to be tried.

## ARGUMENT

## I. ISSUE PRECLUSION CANNOT APPLY TO PLAINTIFF'S CLAIMS.

Under New York law, collateral estoppel will preclude a federal court from deciding an issue if "'(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding.'" *Vargas v. City of New York*, 377 F.3d 200, 205–06 (2d Cir. 2004).

First, Plaintiff's hostile work environment and pre-termination related disparate treatment claims relating to unjustified and intrusive surveillance and unjustified charging were not the subject of his Article 78 proceeding, nor were any of his religion or race-based disparate treatment claims pled, advanced or argued during the Article 78 proceeding. *See* Defs' Ex. X and Y. The specific claim of discrimination in Plaintiff's Article 78 Petition and Amended Petition were termination-related and based on national origin discrimination only. *See* Defs' Ex. X and Ex. Y at ¶ 10, 11 ("The Respondent's actions are due to my nationality"). Defendants' motion acknowledge this, in part, by moving on this basis only as to those counts which relate to "Plaintiff's claims of disparate treatment," excluding Plaintiff's hostile work environment claims. *See* Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment at Pg. 3-5, *Abdelal v. Kelly,* No. 13-cv-04341 (S.D.N.Y. filed July 7, 2016) ("Defs' Br."). As such, the Second, Forth, Sixth, Eighth, Tenth, Twelfth, and Fourteenth Causes of Action pled in the Complaint, are either uncontested or, as a matter of law beyond the scope of any collateral estoppel attack. *See* Ex. 6.

Second, while Plaintiff raised national origin in his Article 78 petition, it was raised in the in his Article 78 appeal in a single sentence at the very end of the brief. It was not decided by the First Department, a circumstance that precludes the application of collateral estoppel. *See Leather v. Eyck*, 180 F.3d 420 (2d Cir.1999) ("Leather's attorney at that hearing did mention what might be construed as a selective prosecution argument. But he did so at most in passing, certainly not explicitly, and only in his closing argument.").

Third, the issue in question – whether or not Plaintiff's termination was motivated in whole or in part by discrimination - was not actually and necessarily decided by the First Department. The First Department's written opinion, dated March 17, 2016, determined that because Plaintiff had engaged in conduct prejudicial to the good order, efficiency and discipline of the NYPD, and that his termination was lawful under a "shocks the conscience" standard. *See* Ex. 11. This is not the same legal standard applied here. Notably, the relevant discrimination statutes involved in Plaintiff's lawsuit involve a "motivating factor" analysis with respect to discriminatory intent which was not required for the First Department to find Plaintiff's termination to be "rational" and supported by substantial evidence. More specifically, unlike substantial evidence review in the Article 78 context, a plaintiff alleging discrimination claims may prevail by establishing "'that an employment decision was motivated both by legitimate and illegitimate reasons' if the 'impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.'" *See Holcomb v. Iona Coll.*, 521 F.3d 130, 142 (2d Cir.2008).

Since both a lawful and an unlawful motive can support a claim of discrimination, it was not necessary for the First Department to reach a decision rejecting the discriminatory motive, and cannot be assumed by the First Department's findings. *See Del Pozo v. Bellevue Hosp. Ctr.*, No. 09 Civ. 4729, 2011 WL 797464, at *6 (S.D.N.Y. Mar. 3, 2011) (quoting *McPherson v.*

*N.Y.C. Dep't of Educ.*, 457 F.3d 211, 216 (2d Cir. 2006) (this Court is "not interested in the truth of the allegations against [P]laintiff but in what 'motivated the employer.'"). As the Court in *Villar v. City of New York* made clear, a [redacted]

> Defendants argue that Plaintiff's admission that she disclosed NYPD information to Alberto, in combination with Commissioner Weisel's finding that she was guilty of disclosing official NYPD information to Alberto, undermines her arguments. (Defs.' Mem. 9–10.) However, the issue before the Court on this claim is not whether Plaintiff was guilty of disclosing official NYPD information, but whether her termination was motivated, even in part, by her sex.

*Villar*, 135 F. Supp. 3d 105, 126 (S.D.N.Y. 2015). In the instant matter, the penalty involved (termination) is similarly challenged as discriminatory, independent of the possibility of a legitimate (i.e. rational) basis for termination. It cannot be said, therefore, that a rejection of Plaintiff's claim that he was terminated for discriminatory reasons was necessary in order to reach the result in the Article 78 proceeding.

Regardless, most of Plaintiff's proof of discriminatory intent, including the [redacted] set forth herein, was not reached in the Article 78 proceeding. Given this, collateral estoppel does not apply. *See Weston v. Cornell University*, 116 A.D.3d 1128, 1130 (2014) (holding that where the prior court did not address whether the denial of tenure was improperly based on gender discrimination, current claims were not actually litigated in prior proceeding).

Regardless, Defendants have waived and forfeited the defense. Issue preclusion is an affirmative defense that normally must be pled in a timely manner or it may be waived. *See* Fed. R. Civ. P. 8(c); *see also Curry v. City of Syracuse*, 316 F.3d 324, 330–31 (2d Cir. 2003). The purpose of requiring the defense be pled in a timely manner "is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate." *Curry*, 316 F.3d at 331.

Here, Defendants failed to file any answer in response to Plaintiff's original complaint, and thereafter failed to timely or with sufficient particularity plead the affirmative defense of issue preclusion. *See* Ex. 7. More specifically, Defendants failed to raise issue preclusion as a basis for dismissal in their motion to dismiss filed in response to Plaintiff's Amended Complaint, and, following the Court's denial of Defendants' Motion to Dismiss, failed to properly plead the affirmative defense with sufficient particularity. *Id.* at ¶ 284. A general equitable defense stating the principles of waiver, estoppel, laches and equity is insufficient to preserve an enumerated affirmative defense under Rule 8(c). *See Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, No. 05–CV–5155, 2010 WL 985201, at *1 (E.D.N.Y. Mar. 15, 2010); *see also Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (a general defense for failure to state a claim under Rule 12(b)(6) is insufficient to preserve an enumerated affirmative defense under Rule 8(c) because one of the purposes of the rule is to "place the opposing parties on notice that a particular defense will be pursued so as to prevent surprise or unfair prejudice"). If a defendant fails to plead an affirmative defense in his or her answer, it is considered waived and is excluded from the case. *See Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir.1984). Defendants have failed to preserve this affirmative defense.

Further, while waiver involves a litigant's intentional relinquishment of a known right, where a litigant's action or inaction is deemed to incur the consequence of loss of a right, a forfeiture occurs. *See Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir.1999). Here, Defendants initially asserted, and then abandoned, arguments based on issue preclusion which were made in support of their application for a stay of discovery, and which were also raised in support of their objection to Plaintiff's motion to compel additional discovery relating to

Defendants' intent to discriminate in terminating Plaintiff. *See* Dkt Nos. 62 and 63. Notably, Magistrate Judge Netburn invited Defendants' counsel to brief their issue preclusion arguments during a June 11, 2015 discovery-related court conference, and Defendants did not pursue the invitation. *See* Dkt. Nos. 42 (Defs' Br. in Support of Their Motion to Dismiss), 62, and 63 (Defs' Opposition to Plaintiff's Motion to Compel). As a result, the parties invested considerable time in discovery of [redacted] which Defendants had previously resisted. The [redacted] in question was not introduced or considered in the Article 78 proceeding, thus expanding the scope of factual issues decided in the instant litigation beyond what was considered in the Article 78 proceeding, including extensive discovery on discriminatory intent with respect to Plaintiff's termination. Further, those issues were previously tested in the Motion to Dismiss briefing, and are again addressed in summary judgment briefing. Where the parties agree that fact issues subject to preclusion defenses should be decided in a litigation, the defense is forfeited. *See Mental Disability Law Clinic, Touro Law Ctr. v. Carpinello*, 189 Fed.Appx. 5, 7 (2d Cir. 2006) (defendants forfeited consideration of preclusion argument by stipulating that the issues was to be decided in the litigation).

## II. PLAINTIFF HAS DEMONSTRATED TRIABLE ISSUES OF MATERIAL FACT WITH RESPECT TO HIS DISPARATE TREATMENT CLAIMS UNDER SECTION 1981, TITLE VII, THE NYSHRL, AND THE NYCHRL.

### A. Legal Standard on Summary Judgment.

Summary judgment is only appropriate when there is no genuine issue of a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Kirkland v. Cablevision Sys.*, 760 F.3d 223, 224 (2d Cir. 2014). The proper inquiry is whether there are any genuine factual issues that properly can be resolved only at a trial because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250

(1986). In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002) *citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Summary judgment may be granted only when the moving party has established their right to judgment with such clarity that the non-moving party cannot recover (or establish a defense) under any discernible circumstance. *Perry v. Int'l Transp. Workers' Fed'n*, 750 F. Supp. 1189, 1194 (S.D.N.Y. 1990). Summary judgment is particularly inappropriate where, as in most employment discrimination cases, an employer's intent and motivation are in issue. *See Gallo v. Prudential Res. Services*, 22 F.3d 1219, 1223 (2d Cir.1994); *Dister v. Continental Group, Inc*., 859 F.2d 1108, 1114 (2d Cir.1988).

Further, "summary judgment dismissing a claim under the NYCHRL should be granted only if 'no jury could find defendant liable under any of the evidentiary routes—McDonnell Douglas, mixed motive, direct evidence, or some combination thereof.'" *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 113, 946 N.Y.S.2d 27 (N.Y.App.Div.2012) (citation omitted). Nor is the standard for establishing discrimination the same under the NYCHRL. For instance, "to make out the third prong of a prima facie case of discrimination under the NYCHRL, a plaintiff must simply show that she was treated differently from others in a way that was more than trivial, insubstantial, or petty." *Williams v. Regus Mgmt. Grp*., LLC, 836 F.Supp.2d 159, 173 (S.D.N.Y.2011); *see also Lytle v. JPMorgan Chase*, No. 08 Civ. 9503, 2012 WL 393008, at *19 (S.D.N.Y. Feb. 8, 2012) (NYCHRL plaintiff "does not need to demonstrate that he was subject to a materially adverse employment action"), *adopted by* 2012 WL 1079964 (S.D.N.Y. Mar. 30, 2012), *aff'd by* 518 Fed.Appx. 49 (2d Cir.2013).

B. **Plaintiff has Established a Prima Facie Case of Disparate Treatment.**

Plaintiff has established a prima facie case of discriminatory discipline, excessive surveillance, and termination. Under the *McDonnell Douglass* paradigm – a three-tiered burden shifting framework – the plaintiff must first establish a prima facie case of discrimination. *See Fisher v. Vassar Coll.*, 66 F.3d 379, 391-92 (2d Cir. 1995); *McDonnell Douglas Corp.v. Green*, 411 U.S. 792, 802 (1973). Once established, the prima facie case creates a rebuttable presumption of discrimination and the defendant has the burden of producing, through the introduction of admissible evidence that the adverse action was taken for a legitimate nondiscriminatory reason. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 – 255 (1981). If the defendant is able to articulate such, the plaintiff then assumes the burden to "show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." *Fisher*, 66 F.3d at 391-92; *McDonnell Douglas,* 411 U.S. at 804. Establishing a prima facie case of discrimination requires a plaintiff to make only a minimal showing. *DeVito v. Valley Stream Cent. High Sch. Dist.*, No. 09-cv-0287, 2011 WL 3471552, at *5 (E.D.N.Y. Aug. 3, 2011).

i. *Plaintiff's Claims of Unjustified and Intrusive Surveillance and Excessive Discipline Are Materially Adverse.*

"A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment." *Joseph v. Leavitt*, 465 F.3d 87, 90 (2d Cir. 2006) (citations omitted). "Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Id.* (citation omitted). Excessive scrutiny and reprimands constitute adverse employment actions when coupled with other negative results such as being placed on probation. *See Honey v. County of Rockland*, 200 F.Supp.2d 311, 320-21

(S.D.N.Y.2002). Further, with the exception of unpaid suspensions, in cases where NYPD surveillance, formal adjudication and discipline are alleged as adverse acts, courts in this Circuit have found adverse action. *See Mullins v. City of New York*, 626 F.3d 47 (2d Cir.2010); *see also Villar,* 135 F.Supp.3d at 123 (upholding possibility of adverse action in NYPD disciplinary process and outcome). This Circuit has stated that "'an employee does not suffer a materially adverse change in the terms and conditions of employment where the employer merely enforces its preexisting disciplinary policies in a reasonable manner,' it has applied this dicta only in cases of suspension with paid leave." *Villar,* 135 F.Supp.3d at 123 citing *Joseph,* 465 F.3d at 90–91; *see also Brown v. City of Syracuse*, 673 F.3d 141, 151 (2d Cir. 2012).

The Second Circuit's decision in *Mullins v. City of New York* is instructive given that it similarly involves an allegation that an [redacted] investigation constitutes an "adverse act" sufficient to support a *prima face* case. *Mullins*, 626 F.3d at 55. In *Mullins*, the plaintiffs claimed to have been subjected to an [redacted] investigation in retaliation for having filed a class action lawsuit seeking unpaid overtime. *Id.* at 58-51. Broadly referencing "employment discrimination" precedent similarly applicable to the instant matter, the Second Circuit in *Mullins* affirmed the district court's issuance of a preliminary injunction, finding that an [redacted] investigation was sufficiently adverse to give rise to a claim of retaliation, stating:

> An [redacted] investigation, like that to which Sergeant Cioffi was subjected, carries with it a possibility of termination, *see* Patrol Guide § 206–13; indeed, Sergeant Cioffi was advised at the outset of the GO–15 that he would be fired if he did not answer [redacted]'s questions. In addition, the NYPD indefinitely postponed Officer Scott's retirement pending resolution of the inquiry into his deposition testimony. Further, all [redacted] allegations appear as part of the ordinary course in an officer's Central Personnel Index—regardless of whether the officer is later exonerated. These notations affect an officer's level of discipline for future infractions and can complicate an officer's request for transfers or promotions.

*Id.* at 54. In the instant matter, similar to the plaintiff in *Villar*, Plaintiff's [redacted]

[redacted] and supplemental charging are significant adverse actions to support his discrimination claim. *See Villar,* 135 F.Supp.3d at 123.

Further, contrary to Defendants' assertions, the terms and conditions of Plaintiff's employment were altered by Defendants' year-plus investigation of him. First, as described in *Mullins* and above, for many reasons, an [redacted] investigation carries with it substantial risk of harm to a subject's employment and reputation in the NYPD. And, as was the case in *Mullins*, in the instant matter, Plaintiff actually suffered adverse consequences during, or as a result of, the [redacted] investigation, including but not limited to: [redacted]

[redacted]

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[1] The CPI is a computerized databased of personnel information. *See* "Information and Technology, Blueprint for the Future: Information and Technology for Community Policing into the 21st Century", available at https://www.ncjrs.gov/pdffiles1/Digitization/145456NCJRS.pdf. "The "Confidential Performance Profile" is an up-to-date and confidential profile of uniformed members who are "personnel concerns" to assist in the supervision, training and development needs of such uniformed members. Included in the profile would be such matters as all past administrative transfers, transfers made by the borough commander at the request of member's previous commanding officer, sick record, disciplinary record and all other *Central Personnel Index* indicators as well as appropriate command data. *See generally,* NYPD Patrol Guide ("P.G.").

[redacted] *See* Pl's 56.1 at ¶¶ 15a-x. Contrary to Defendants' assertion in their brief, these intrusions were known to Plaintiff at the time of his P.G. 206-13 Interrogation, and during the remainder of the investigation into him. *See* Ex. 8 at 79-85; 90. Plaintiff further testified at his deposition that the intrusive surveillance caused emotional distress and he sought clinical psychiatric treatment as a result. *Id.* at 98-99.

Regardless, Plaintiff's pre-termination related disparate treatment claims are not limited to the [redacted] investigation into the incident at the Hudson County correctional facility. In addition to the gross privacy intrusions of the initial [redacted] investigation, Plaintiff was also subjected to other independent adverse acts of discrimination, identified above, which involved or flowed from the [redacted] investigation, including being (i) [redacted] *See* Pl.'s 56.1 at ¶¶ 24-26 Each of these disciplinary actions altered the terms and conditions of his employment since they are necessarily recorded in his CPI and were reviewable in the event of additional discipline, promotion, or attempted transfer. *See* Ex. 2; *see also* P.G. § 205-48. Additionally, [redacted] requires that the subject undergo quarterly performance reviews in addition to regular annual reviews, a final memorandum at the end of the monitoring period, heightened monitoring by the Performance Monitoring Unit, and the potential for targeted integrity tests, [redacted] *See* P.G. §§ 205-48; 205-57; *see also* Ex. 2 at 57-58; 59; Pl.'s 56.1 ¶¶ 15q. In fact, [redacted]

[redacted]

ii. *Plaintiff has Raised a Triable Inference of Discrimination.*

There is no rigid rule for determining whether a plaintiff has demonstrated circumstances giving rise to an inference of discrimination. *See Chertkova v. Conn. Gen. Life Ins.*, 92 F.3d 81, 91 (2d Cir.1996). There are however, several ways to demonstrate an inference of discrimination, including but not limited to, evidence of discriminatory comments made by those with influence over a plaintiff's employment, or showing of preferential treatment for employees outside of the protected class or that the plaintiff was treated less favorably than "similarly situated" employees outside the protected group.[2]

In disparate treatment cases involving allegations of disparate discipline supported by [redacted]proof, "an employee offered for comparison will be deemed to be similarly situated in all material respects if (1) ... the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) ... the conduct for which the employer imposed discipline was of comparable seriousness." *Graham v. Long Island Rail Road,* 230 F.3d 34, 40

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[2] *See Owens v. New York City Housing Authority*, 934 F.2d 405, 410 (2d Cir.1991) (a genuine issue of fact exists on the matter of pretext where offensive statements, although not numerous, were made by individuals with substantial influence over plaintiff's employment); *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 55 (2d Cir.1998) (comments made by a non-decision-maker constituted evidence of discrimination where "jury could well believe" that the "comments reflected company policy and hence constituted evidence of discrimination"); *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1210 (2d Cir.1993) (discriminatory statements made about plaintiff by various supervisors and managers who were not decision makers were properly admitted at trial because "they showed the pervasive corporate hostility towards [plaintiff] and supported her claim that she did not receive a promotion due to her employer's retaliatory animus"); *Azar v. TGI Friday's, Inc.*, 945 F.Supp. 485, 499 (E.D.N.Y.1996) (remarks made by non-decisionmaker constituted direct evidence of discrimination where speaker was plaintiff's superior who conferred with decisionmaker "on a regular basis as to the employees' performance, and, with reasonable certainty he advised the General Manager about employee matters such as those involving the plaintiff"); *Marfia v. T.C. Ziraat Bankasi*, 903 F.Supp. 463, 468 (S.D.N.Y.1995) (upholding jury verdict which found defendant discriminated against plaintiff where "the jury could have reasonably found that [alleged non-decisionmaker who made discriminatory comments] influenced the [decisionmaker], thereby 'poisoning the well' "), vacated on other grounds, 100 F.3d 243 (2d Cir.1996). *See also Chambers v. TRM Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994) and *Graham*, 230 F.3d at 39 [redacted] Whether two employees are similarly situated is for a jury to decide. *Graham*, 230 F. 3d at 39.

(2d Cir.2000). Whether two employees are similarly situated is generally a triable issue for the fact-finder. *See Beachum v. AWISCO N.Y.*, 785 F.Supp.2d 84, 94 (S.D.N.Y.2011).

"Pattern and practice" evidence can also be offered to support an inference of discrimination. While "pattern and practice" evidence cannot support a claim of discrimination as an independent and distinct method of establishing liability, evidence of an employer's general practice of discrimination may be highly relevant to the question of intent in individual disparate treatment or disparate impact claims. *See Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 150 (2d Cir.2012). A pattern or practice claim requires a showing that (1) the alleged racial discrimination amounted to more than sporadic acts of discrimination, but rather the defendant's "standard operating procedure" or the "regular rather than the unusual practice," and (2) the discrimination was directed at a class of victims. *See United States v. City of New York*, 717 F.3d 72, 83 (2d Cir. 2013) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

**1. Non-Termination Related Claims: Inference of Discrimination.**

First, with respect to Plaintiff's non-termination claims [redacted] Plaintiff's inference of discrimination is based on evidence demonstrating [redacted] "pattern and practice" evidence of institutional "bias-based profiling" involving

Muslims of middle-eastern descent, and Plaintiff specifically, within the NYPD and [redacted].

With respect to both Plaintiff's termination and non-termination related claims, discovery has been fruitful, and has resulted in an abundance of proof supporting an inference of discrimination in each alleged adverse act, much of it originating from [redacted] and, with respect to Plaintiff's termination claims, [redacted].

With respect to (i) above, it is uncontested by the NYPD that no evidence ever existed to suggest that Plaintiff was involved in terrorism or criminal conduct, yet despite this fact, his [redacted] bias-based profiling" permeated the [redacted] investigation, [redacted] Notably, despite having been justified as an administrative investigation into whether or not Plaintiff was "associating" with known criminals for the sake of a disciplinary charge, [redacted] Clearly, Plaintiff's race, national origin, and religion motivated Defendants' year-plus investigation into [redacted]

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[3] It was evident early on in the investigation that Plaintiff did not have any criminal association with Mr. Gadou. *Id.* [redacted]

Nonetheless, Plaintiff's [redacted] investigation, overseen by [redacted]. [redacted]

[redacted]

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[redacted]

Further, the [redacted]

Given this clear evidence of bias on the part of [redacted], Plaintiff has established an inference of discrimination with respect to each non-termination related adverse actions identified above. [redacted] and its officers [redacted]

[redacted]

With respect to (iii) above, Plaintiff has presented proof that Defendant Kelly participated in an anti-Muslim propaganda film whose main narrative is that Muslims are trying to violently "infiltrate and dominate America." *See* Ex. 12. Defendant Kelly's direct involvement in the film, which he himself admitted was offensive, is evidence of illegitimate bias by the ultimate decision maker, Commissioner Kelly and indicative of the broad anti-Muslim/anti-Arabic culture fostered by Defendant Kelly. *Id.* At his direction, the NYPD developed a widespread policy of investigating, profiling and monitoring innocent Muslim and/or Arab civilians simply based on their race, national origin and religious beliefs. These allegations were the basis of a lawsuit, *Raza v. City of New York et al.*, which involved claims of bias-based profiling in investigations conducted by [redacted], the same NYPD department implicated in each of the adverse acts alleged by Plaintiff. *See Raza*, 998 F. Supp. 2d 70 (E.D.N.Y. 2013). Earlier this year, the NYPD settled the lawsuit and a consent decree was entered establishing a number of reforms designed to protect New York Muslims and others from discriminatory and unjustified surveillance. *See Raza*, 13–cv–3448, Dkt. No. 121. Here, Plaintiff's allegations about the culture of bias are sufficiently supported by NYPD files that provide proof that NYPD leadership, particularly Commissioner Kelly, knowingly tolerated anti-Muslim and anti-Arabic attitudes and conduct, sufficient to suggest that Defendants' decision to terminate Plaintiff was motivated by an illegal animus.

**2. Termination Related Claim: Inference of Discrimination.**

Plaintiff was ultimately charged with a number of minor acts of misconduct, and accused of failing to notify a commanding officer of attempting to visit an inmate at the Hudson County Correctional Facility in violation of P.G. Interim Order No. 11. *See* Defs' Exs. G, T; and Q. [5] None of these violations, individually or in concert, warranted termination. *See* Defs' Ex. Q at 41. Indeed, the Advocates' Office, which imposes penalties on a regularly basis, offered as a

[5] The other charges included: a) on September 22, 2007 it was alleged that Plaintiff failed to properly search a prisoner in violation of Prisoners General Procedure 210-01; (b) it was alleged that Plaintiff was engaged in off duty employment without obtaining prior approval, in violation of P.G. 205-40; (c) between July 15, 2008 and July 19, 2008, it was alleged that Plaintiff was absent from his residence while on sick report in violation of P.G. 205-01; (d) between March 2008 and June 2008, it was alleged that Plaintiff falsely reported residing in New York, but in fact resided in New Jersey in violation of P.G. 203-18; (e) on February 8, 2011, it was alleged that Plaintiff failed to prepare a UF-250 following a stop and frisk in violation of P.G. 203-05; (f) on February 8, 2011, it was alleged that Plaintiff failed to maintain an Officer's Activity log in connection with the above stop and frisk in violation of P.G. 212-08. *See* Defs' Ex. G and Q.

penalty a loss of 30 vacation days and a 30-day suspension in exchange for a plea to the charges, Plaintiff countered with a proposal of a 60-day suspension and one-year probation, which the Advocate's Office subsequently accepted. *See* Pl.'s 56.1 ¶ 41a. Defendant Kelly rejected the negotiated penalty and instead gave Plaintiff an ultimatum—resign without his retired police officer identification, or take the matter to trial. *See* Ex. 6 ¶ 68.

Plaintiff proceeded to a five-day trial that dragged on for almost a year, during which the Department zealously presented its case, calling eight witnesses and offering numerous pieces of evidence into the record. *Id.* At his attorney's recommendation, Plaintiff plead guilty to most of the minor charges, however, he has always vehemently contested the allegation that he represented himself as a member of Interpol during the visit to the Correctional Facility. *See* Defs' Ex. Q; *see also* Pl.'s 56.1 ¶¶ 48-52. At the conclusion of the administrative trial, the Deputy Commissioner of Trials ("DCT") Martin G. Karopkin submitted a forty-three-page Report and Recommendation (the "Report") to the Commissioner dated May 23, 2012. *See* Ex. Q. DCT Karopkin found Plaintiff guilty of several failures in the workplace, "non of which even in combination would warrant termination." *Id.* And while Plaintiff was found guilty of visiting the Correctional Facility without prior permission and representing himself as a member of Interpol, in DCT Karopkin's view, this infraction did not warrant termination. *Id.* at 42. Notably, the DCT stated it was "obvious" that going to the Hudson County Correctional Facility was the charge the Commissioner's recommended penalty was based on. *Id.* DCT Karopkin's recommended penalty for Plaintiff's misconduct was *less* than what was originally offered by the Advocate's Office – forfeiture of 45 vacation days and one-year probation. *Id.* at 43.

[redacted]

First, an inference of discrimination can be found based on the overwhelming evidence of profiling-based bias by the investigating [redacted] Their biased investigation was used as the basis for [redacted]. Second, evidence that Commissioner Kelly himself was involved in the production of an anti-Muslim film indicates that the ultimate decision maker harbored discriminatory attitudes and bias, and is sufficient to support the allegation that illegal animus motivated the adverse employment action. *See Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003) (that the decision maker "knowingly tolerated anti-Semitic attitudes and conduct… supports the assertion that [the] decisions not to promote plaintiff and to transfer him to a subordinate position were motivated by an illegal animus"); *Hunt v. Cent. Consol. Sch. Dist.*, 951 F. Supp. 2d 1136, 1212-1213 (D.N.M. 2013) (finding that complaint alleged a plausible religious disparate-treatment discrimination claim where individual decision makers participated in hate-speech blog comments about Mormons).

Third, an inference of discrimination can be found [redacted]

[redacted]

[redacted] supports an inference of discrimination.

In an effort to rebut the inference of discrimination created by [redacted]

[redacted]

Finally, the evidence that the NYPD and [redacted] condoned policies and practices which were discriminatory and based on bias and stereotypes, as discussed herein, constitutes "pattern and practice" evidence sufficient to support an inference of discrimination with respect to Plaintiff's termination.

### C. Plaintiff Has Demonstrated that Defendants' Proffered Legitimate, Non-Discriminatory Reasons for the all the Adverse Actions are Pretextual.

A plaintiff may nonetheless still prevail if he can show that defendant's decision to terminate him was, in fact, "pretext for unlawful discrimination." *Abrams v. Dep't of Pub. Safety*, 764 F.3d 244, 251 (2d Cir. 2014). Pretext "may be demonstrated either by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, or by reliance on the evidence comprising the prima facie case, without more." *See Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent*, 198 F.3d 68, 72 (2d Cir.1999) (quotation omitted). Plaintiff is not required to prove that the employer's proffered reasons are false but only that they were not the only reasons and that a discriminatory motivation made a difference. *Rivera v. Baccarat, Inc.*, No. 95 CIV. 9478 MBM JCF, 1997 WL 400119, at *5 (S.D.N.Y. July 15, 1997) (citations omitted).

Furthermore, the same circumstances that raise an inference of discrimination may permit the plaintiff to establish a triable issue of fact in response to the defendant's proffered explanation. *Rivera,* 1997 WL 400119, at *5, citing *Maresco v. Evans Chemetics, Division of W.R. Grace & Co.*, 964 F.2d 106, 114 (2d Cir. 1992). For the reasons set forth above, and for the reasons set forth below, Plaintiff has sufficient evidence that Defendants position – that misconduct such as that committed by Plaintiff justified the efforts undertaken by [redacted] in investigating Plaintiff and is frequently penalized with termination and thus shall be considered a "legitimate business decision" – is pretextual. The position is entirely unsupported by the [redacted] and thus unworthy of credence.

First, Plaintiff's evidence of pretext with respect to the non-termination claims stem from [redacted]

[redacted]

Second, with respect to Plaintiff's claim relating to his termination, Plaintiff's evidence of pretext stems from (i) the evidence of discriminatory intent on behalf of the [redacted] and its investigators, [redacted] identified above which similarly supports a finding of pretext, including [redacted]

More specifically, within two months of the incident at the Hudson Valley Correctional facility, which gave rise to the the "criminal association" investigation, [redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted] With respect to all of Plaintiff's claims, the aforementioned evidence is legally sufficient to demonstrate pretext. *Id.* at 125-126 citing *Graham*, 230 F.3d at 43 ("[a] showing that similarly situated employees belonging to a different [protected class] received more favorable treatment can also serve as evidence that the employer's proffered legitimate, non-discriminatory reason for the adverse job action was a pretext for ... discrimination.").

## III. PLAINTIFF HAS ESTABLISHED A TIMELY PRIMA FACIE CASE OF RACE, NATIONAL ORIGIN, AND RELIGIOUS-BASED HOSTILE WORK ENVIRONMENT.

In order to survive summary judgment on a claim of hostile work environment harassment, a plaintiff must produce evidence that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'" *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (quotations omitted). "A hostile working environment is shown when the incidents of harassment occur either in concert or with a regularity that can reasonably be termed pervasive." *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 724 (2d Cir.2010) (citation omitted).

"In determining whether a claim of hostile work environment survives summary judgment" under the NYCHRL, "the relevant consideration is whether there is a triable issue of fact as to whether the plaintiff 'has been treated less well than other employees because of'" his or her protected status. *See Barounis v. N.Y.C. Police Dep't*, No. 10 Civ. 2631, 2012 WL 6194190, at *9 (S.D.N.Y. Dec. 12, 2012) (quoting *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27, 39 (1st Dep't 2009)). A plaintiff need not "show 'severe and pervasive' conduct to establish a hostile work environment claim" under the city statute. *Id.* "The NYCHRL...is not a 'general civility code' and 'petty slights and trivial inconveniences' are not actionable under it." *Id.* (citations omitted). "[H]ostile work environment claims under [the NYCHRL] may be based on events outside the statute of limitations period to the extent they constitute 'part of the same actionable hostile work environment practice,' and at least one act contributing to the claim occurs within the filing period." *Gutierrez v. City of New York*, 756 F. Supp. 2d 491, 501 (S.D.N.Y. 2010) (citation omitted).

Plaintiff's hostile work environment claims are based on the [redacted] With respect to the timeliness of certain acts which predate the relevant limitations period stemming from Plaintiff's charge of discrimination, consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period and is sufficiently related to an incident within the limitations period. *See McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 76 (2d Cir.2010). Here, those portions of the [redacted] were part and parcel with [redacted] The court in *Villar*, [redacted] found the same. *See* 135 F.Supp.3d at 125-126 ("Here, the similarity in perpetrator, unit assignment, and type of conduct make clear that the acts committed in the first period and the second period are part of the same actionable hostile work environment practice.")

Further, for all of the reasons outline above, the record evidence is sufficient to establish a prima facie case of hostile work environment sufficient to survive Defendants' motion. The NYPD fostered an environment that was openly hostile to Muslims and those of Middle Eastern decent, by implementing surveillance programs to watch and track innocent Muslims in the New York Metro-Area and instilling fear and prejudice in its new officers by playing an Anti-Muslim film during new officer training. *See* Ex. 6 at ¶¶ 98-109.[7] Meanwhile, Plaintiff individually fell victim to the NYPD's anti-Arabic/anit-Muslim hostility, as he himself was a target of [redacted] The harassment did not end at the conclusion of the investigation; rather, Plaintiff was: (a) charged with numerous dated acts of misconduct, the importance of which the NYPD exaggerated in an effort to create a pretextual reason for discharging him, (b) forced to defend his integrity and service during an administrative trial that dragged on for over a year, and (c) ultimately terminated for conduct that did not warrant such a punishment.

Finally, the hostile work environment Plaintiff suffered was objectively severe and pervasive. Plaintiff was subjected to an [redacted] occurring during a time period when anti-Muslim sentiment pervaded the NYPD's culture and formal agenda, and during the same period that "The Third Jihad" was played for cadets, prompting complaints of its offensiveness, a fact Defendant Kelly has admitted.

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[7] The question of whether or not Plaintiff individually experience the hostility of these programs and "The Third Jihad" training video is immaterial to any determination of Plaintiff's *prima facie* case. The Second Circuit has cautioned that "[b]ecause the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir.1997).

## CONCLUSION

Based on the foregoing, Plaintiff respectfully request that this Court issue an order denying Defendants' Motion for Summary Judgment, and issue such other further relief as this Court deems just and proper.

Dated: August 26, 2016
New York, NY

Respectfully submitted,

By: ______________________

Christopher Q. Davis (CD-7282)
Rachel M. Haskell (RH-8248)
**The Law Office of Christopher Q. Davis**
225 Broadway, Suite 1803
New York, New York 10007
Telephone: (646) 430-7930
*Attorneys for Plaintiff*